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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1987

ENRIQUE MELGUIZO

Petitioner,

vs,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Question Number One:

Is the burden of proof on the defendant on the court's determination to dismiss an indictment with or without prejudice for failure to meet the deadlines of the Speedy Trial Act?

Question Number Two:

Does a finding of negligence weigh in favor of dismissal without prejudice for failure to meet the deadlines of the Speedy Trial Act?

Question Number Three:

Is the offense of failure to file a currency transaction report a serious offense for purposes of consideration of the sanction provisions of the Speedy Trial Act?

PARTIES TO THE PROCEEDING

All parties are listed in the caption of this case in this Court.

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IN THE SUPREME COURT OF THE UNITED STATES

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ENRIQUE MELGUIZO

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OPINION BELOW

Petitioner's conviction was affirmed on appeal by the United States Court of Appeals for the Fifth Circuit on August 4, 1987. 824 F.2d 370 (5th Cir. 1987). A copy of the opinion is included in the Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner was found guilty on February 17, 1987; the judgment was entered on February 19, 1987. Petitioner's conviction was affirmed by the United States Court of Appeals for the Fifth Circuit on August 4, 1987. No motion for rehearing was filed. This petition is filed within sixty days after judgment. The jurisdiction of this Court is conferred pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

18 U.S.C. §3162 (a)(2):

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense, the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

STATEMENT OF THE CASE

On August 12, 1986, an indictment was filed in the United States Disstrict Court for the Southern District of Texas charging petitioner with two counts of failure to file a Currency Transaction Report (31 U.S.C. §5313) in Cause Number B-86-403. On August 13, 1986, petitioner was arrested and released on a personal recognizance bond. Also on August 13, 1986, petitioner was arraigned and jury selection was set for October 6, 1986.

On September 23, 1986, a superseding indictment, charging the same offenses, was filed. Arraignment was held on October 2, 1986 and jury selection was set for November 5, 1986. On October 3, 1986, the Government moved to dismiss the first indictment. On October 31, 1986, petitioner filed a motion to dismiss the superseding

indictment under the Speedy Trial Act. On November 4, 1986, the Government filed a response to petitioner's Motion to Dismiss. The Government conceded that a violation of the Speedy Trial Act had occurred but asked the District Court to dismiss the indictment without prejudice. On November 5, 1986, the District Court announced that the motion to dismiss would be granted and that the decision as to whether the dismissal would be with or without prejudice would be made after petitioner had the opportunity to submit a brief. On November 26, 1986, the District Court dismissed the indictment without prejudice. (Appendix at A-4).

On December 2, 1986, petitioner was indicted for the same offenses in cause number B-86-582. A jury trial was commenced on February 6, 1987; during the trial petitioner waived a jury and the case was tried before the court. On February 17, 1987, petitioner was convicted and fined $2,500 on each count for a total of $5,000.00. (Appendix at A-7).

REASONS FOR GRANTING THE WRIT

Question Number One:

> Is the burden of proof on the defendant on the court's determination to dismiss an indictment with or without prejudice for failure to meet the deadlines of the Speedy Trial Act?

In holding that the burden of proof is on the defendant on the court's determination to dismiss an indictment with or without prejudice, the Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. In considering the factors that would support a dismissal with prejudice, the Court of Appeals, at 372 (Appendix at A-13)., held:

> Bound by the clear words of the Speedy Trial Act[11] we must place on Melguzio the burden of proving the existence of these factors.
>
> 11. "The defendant shall have the burden of proof of supporting such motion [to dismiss]." 18 U.S.C. §3162(a)(2) (1982). *See also Salgado-Hernandez,* 790 F.2d at 1268 & n.14.

Petitioner submits that, although 18 U.S.C. §3162(a)(2) places the burden of proof on the defendant to support a motion to dismiss, the statute does not speak to the burden of proof on the determination of whether the indictment will be dismissed with or without prejudice. Before dismissing an indictment pursuant to Section 3162(a)(2), the trial court must make two determinations: 1) Was the defendant brought to trial within the time limit?; if not, 2) Should the indictment be dismissed with, or without, prejudice? The determinations are distinct, as is illustrated by the bifurcated procedure employed by the District Court in the case at bar: the Court announced that the motion to dismiss would be granted and that the decision as to whether the dismissal would be with or without prejudice would be made after further consideration.

The theory that the defendant has the burden of proof on the court's determination to dismiss with or without prejudice has its genesis in *United States v. Salgado-Hernandez,* 790 F.2d 1265, 1268 n.14 (5th Cir. 1986). Other than the Fifth Circuit, no federal court has read 18 U.S.C. §3162 (a)(2) to place such a burden on the defendant. Although it does not state who had the burden of proof, the opinion in *United States v. Russo,* 741 F.2d 1264 (11th Cir. 1984) indicates that the Eleventh Circuit does not share the Fifth Circuit's interpretation. In *Russo*, the court held that the government was required to demonstrate some justification for its negligent delay in order to warrant a dismissal without prejudice. *Id.* at 1267.

The holding of the Fifth Circuit is based solely on its reading of the statute. Although the statute is silent as tho the allocation of the burden of proof on the court's determination to dismiss with or without prejudice, the legislative history indicate that it was not the intent of Congress to place the burden on the defendant. The court's opinion in *United States v. Caparella*, 716 F.2d 976 (2nd Cir. 1983), contains a good summary of the legislative history of the Speedy Trial Act:

> Drawing heavily upon the ABA Standards, Representative Abner Mikva introduced the "Pretrial Crime Reduction Act of 1971" before the House of Representatives. H.R. 7107, 92d Cong., 1st Sess. (1971), reprinted in Partridge at 279-85. Like the ABA Standards, the Mikva bill provided for dismissal with prejudice.
>
> The 1973 Senate version of the bill retained the dismissal sanction but, as a compromise, permitted reprosecution "if the court in which the original action was pending finds that the attorney for the government has presented compelling evidence that the delay was caused by exceptional circumstances which the government and the court could not have foreseen or avoided." S. 754, 93d Cong., 2d Sess. (1974), reprinted in Partridge at 310-34. This version was passed by the Senate and sent to the House.
>
> There, the House Judiciary Committee restored the dismissal with prejudice sanction. . . .
>
> Ultimately, the House rejected the sanction of outright dismissal with prejudice and adopted the compromise position found in present section 3162(a)(1), under which courts must consider and balance the four factors already noted. The Senate speedily adopted the

compromise in its passage of the bill. *Id.* at 978-9.

Since the House bill contained a mandatory dismissal with prejudice sanction and the Senate bill permitted dismissal without prejudice, if the government presented compelling evidence that the delay was caused by exceptional circumstances, it would be an anomalous interpretation to conclude that the intent of the compromise bill was to place the burden of proof on the defendant.

The issue of the burden of proof on the court's determination to dismiss with or without prejudice merits resolution by this Court as the issue arises in every case in which the trial court determines that the deadlines of the Speedy Trial Act have not been met. The litigants and trial courts faced with the issue have the unequivocal answer provided by the Fifth Circuit in the case at bar and in *Salgado-Hernandez, supra.* Although the answer provided by the Fifth Circuit is clear, petitioner submits that it is erroneous; a plain reading of the statute and an examination of the legislative histroy do not support the holding that the burden of proof is on the defendant. To the detriment of the administration of the criminal law, other courts may adopt the erroneous holding of the Fifth Circuit rather than the view of the Eleventh Circuit. This issue is ripe for resolution by this Court.

Question Number Two:

Does a finding of negligence weigh in favor of dismissal without prejudice for failure to meet the deadlines of the Speedy Trial Act?

The Fifth Circuit accepted the District Court's finding that the delay in bringing petitioner to trial was a result of "administrative neglect or of negligence on the part of the United States Attorney's office." 824 F.2d at

372. The Court of Appeals held that the finding of negligence weighed in favor of dismissal without prejudice. *Id.* This holding of the Court of Appeals is in conflict with the decision in *Caparella, supra.* Additionally, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The Fifth Circuit held:

> As we held in *Salgado-Hernandez,* government oversight cannot always excuse a failure to meet the speedy trial deadline, and the court should take into consideration such factors as whether the government regularly or frequently fails to meet the deadlines more than once with respect to the same defendant. Bound by the clear words of the Speedy Trial Act, we must place on Melguizo the burden of proving the existence of these factors. Because he has failed to make any such showing, we find that the government's oversight in this case was not regular, frequent, or repetitive. The district court, therefore, did not err in determining that a dismissal with prejudice would have no prophylactic effect, or in concluding that the facts surrounding the delay weighed in favor of dismissal without prejudice. 824 F.2d at 372, (Appendix at A-13); (footnotes omitted).

The Fifth Circuit previously held that the fact that the delay was the result of the government's negligence was a factor weighing in favor of dismissal without prejudice. *Salgado-Hernandez, supra,* at 1268. The holding in the case at bar and the holding in *Salgado-Hernandez* conflict with the holding in *Caparella, supra.* In *Caparella,* the court held that the failure to comply with the Speedy Trial Act was the result of the prosecutor's negligence. *Id.* at 980. The court held:". . . given the government's negligent conduct, as discussed, we conclude that the second factor

militates in favor of dismissal with prejudice." *Id.*

The statute is silent as to the effect of delay resulting from the government's negligence. An examination of the legislative history of the Speedy Trial Act indicate that the Congress was attempting to remedy the problem of delay caused by negligence. The House Committee on the Judiciary reported:

> The Committee believes that unlike certain other rights secured by the Constitution, the right to a speedy trial has not been denied purposefully by those who control the reins of justice, but unwittingly by a system which has not matured fast enough to keep pace with the new demands placed upon it by a changing and complex society.

1974 U.S. Code Cong. & Ad.News 7409-10.

The conflict between the Fifth and Second Circuit Courts of Appeals should be resolved by this Court.

Question Number Three:

> Is the offense of failure to file a currency transaction report a serious offense for purpose of consideration of the sanction provisions of the Speedy Trial Act?

In holding that the offense of failing to file a currency transaction report[1] is a serious offense for purposes of the Speedy Trail Act, the Fifth Circuit has decided an

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[1] 31 U.S.C. §5313: Reports on domestic coins and currency transactions

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other menetary instruments the Secretary of Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the

important question of federal law which has not been, but should be, settled by this Court. The Fifth Circuit's holding in the case at bar, although not in direct conflict with the Second Circuit's holding in *United States v. Caparella*, 716 F.2d 976 (2d Cir. 1983) does create an uncertainty in the law when the two cases are compared.

In holding the offense of failing to file currency transactions reports to be serious, the Fifth Circuit looked only to the possible sentence if the court assessed the maximum term of imprisonment and ordered that the sentences be served consecutively.

> The two counts of failing to file currency transaction reports with which Melguizo was charged carried a combined possible sentence of ten years imprisonment. This court upheld, in *Salgado-Hernandez*, a district court determination that the crime of illegally transporting aliens for which the defendant faced a possible fifty-five year prison term, was serious. We find that a possible sentence of ten years is also sufficient indication that the offense is serious. 824 F.2d at 371, (Appendix at A-11-12) (footnotes omitted).

The Fifth Circuit relied on its opinion in *Salgado-Hernandez, supra.* In holding that the offense of illegal transportation of aliens to be a serious offense for Speedy

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(footnote 1 continued)
institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participan acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

31 U.S.C. §5322: Criminal penalties

(a) A person wilfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315) shall be fined not more than $250,000, or imprisonment not more than five years, or both.

Trial purposes, the Fifth Circuit in *Salgado-Hernandez* primarily relied on *United States v. Hawthorne*, 705 F.2d 258 (7th Cir. 1983). The opinion in *Salgado-Hernandez* stated: ". . . the Seventh Circuit has held in United States v. Hawthorne that an offense punishable by five years imprisonment, unlawful possession of a stolen check, is serious for purposes of the Speedy Trial Act." *Id.* at 1268. A careful reading of *Hawthorne* reveals that the offense the court found to be serious was "unlawful possession of stolen *government* checks" which is punishable by imprisonment for not more than *ten* years.[2]

In *Caparella, supra*, the court examined an alleged theft by a Postal Service employee (18 U.S.C. §1709) which was punishable by imprisonment of not more than five years ans a fine of not more than $2,000. *Id* at 977. In considering the seriousness of the offense, the court in *Caparella* held: 'As to the first factor, while recognizing that a breach of the public trust is not to be ignored, we do not consider petitioner's conduct a "serious" crime, absent exacerbating circumstances such as violence, which is not

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[2] 18 U.S.C. Section 641:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retrains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted --

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Since the charge was brought by indictment in District Court the indictment clearly alleged a value of over $100.

here present.' *Id.* at 980.

Petitioner submits that the broader examination employed by the court in *Caparella* is the type of examination intended by Congress. Congress could have directed the court to consider the maximum possible punishment rather than the seriousness of the offense. It did not do so. Petitioner submits that the Fifth Circuit should have examined all factors relevant to determine the seriousness of the offense, not merely the maximum possible punishment. An examination of the offense alleged in the case at bar should have included a consideration of the lack of violence, the absence of a breach of public trust and the lack of direct harm to any individual or to the government.

The holding, in the case at bar, that the offense of failing to file currency transaction reports is a serious offense for purposes of consideration under 18 US.C. §3162 stands out as being the least serious offense to be classified as serious by the courts of appeals. The holding cannot be reconciled with the holding in *Caparella, supra.* To aid the administration of criminal law, and to prevent an unfair result in the case at bar, this court should resolve this issue.

CONCLUSION

WHEREFORE, premises considered, petitioner prays this Honorable Court will grant his petition for writ of certiorari.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ENRIQUE MELGUIZO

Petitioner,

vs,

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this court, certifies that pursuant to Rule 28.3, Supreme Court Rules, he served the within Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit on the counsel for Respondent by enclosing three copies thereof in an envelope, postage prepaid, addressed to:

The Honorable Charles Fried
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

by depositing same in the United States mail, on September 2, 1987, and further certifies that all parties required to be served have been served.

E. DALE ROBERTSON

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Filed
NOV 26 1986

UNITED STATES OF AMERICA	§	
	§	
VS.	§	Criminal No.
	§	B-86-403
ENRIQUE MELGUIZO		

MEMORANDUM AND ORDER

FACTS

Defendant Enrigue Melguizo was indicted August 12, 1986 for unlawfully failing to file with the Internal Revenue Service within the fifteen (15) day period prescribed by law, a Currency Transaction Report (IRS Form 4789) in connection with an exchange of a sum of United States currency in excess of $10,000 with IRS Special Agent Louis Carillo; acting in an undercover capacity. Defendant was arrested on August 13, 1986 and released on bond that same day. The indictment was unsealed on August 14, 1986. Defendant Melguizo entered a plea of not guilty and the case was placed on the October trial docket.

A superceding[sic] indictment was returned and filed on September 23, 1986 due to technical errors in the language used to charge the Defendant in the original indictment. The substantive charges in the indictment did not change. Defendant Melguizo was then arraigned on the superceding[sic] indictment on October 2, 1986, at which time he entered a plea of not guilty. The Magistrate handling the arraignment scheduled the superceding[sic] indict-

ment for the November trial docket. Since the superceding[sic] indictment was issued before the original indictment was dismissed and since no substantive changes in the charge were made, the time period for Speedy Trial purposes began to run from the date of the unsealing of the original indictment, August 14, 1986. The Government, in fact, in its response to Defendant's Motion to Dismiss for Violation of the Speedy Trial Act, conceded that there had been a technical violation of the Speedy Trial Act, 18 U.S.C. § 3161. As a consequence, this Court orally dismissed the original indictment on November 5, 1986 pursuant to 18 U.S.C. § 3162(a)(2). Therefore, the only issue before this Court is whether the dismissal should be with or without prejudice.

ANALYSIS

Title 18, United States Code, Section 3162(a)(2) states that in determining whether to dismiss the case with or without prejudice, the Court shall consider, among others, the following factors: the seriousness of the offense, the facts and circumstances of the case which led to the dismissal, and the impact of a reprosecution on the administration of the speedy trial provisions and on the administration of justice.

A) The Seriousness of the Offense

The Speedy Trial Act applies to felonies and to misdemeanors other than petty offenses. *See* 18 U.S.C. § 3172. This Court is permitted to use its discretion in assessing the relative severity of the crime of failure to file a Currency Transaction Report (IRS Form 4789). That crime is a felony punishable by imprisonment up to five (5) years and/or a fine of $250,000. In *United States v. Hawthorne*, 705 F.2d 258 (7th Cir. 1983), the Seventh Circuit held that an offense punishable by five (5) years imprisonment,

purpose of the Speedy Trial Act. Similarly, in *United States v. Salgado—Hernandez,* 790 F.2d 1265, 1268 (5th Cir. 1986), the Fifth Circuit held that the crime of illegally transporting aliens is a serious offense in light of the Speedy Trial Act. The offense in this case is at least as grave as the offenses involved in the cited cases and, accordingly, this Court finds that the offense of failure to report a currency transaction report is a serious offense for Speedy Trial purposes.

B) **The Facts Surrounding the Delay**

The Government proffers several reasons for their failure to meet the Speedy Trial deadline. First, they assert that the United States Magistrate took it upon himself to arraign the Defendant Melguizo on the superceding[sic] indictment on October 2, 1986 and reschedule the final pretrial conference and jury selection from the previously scheduled date of October 6 and 7, 1986 to November 3, and 5, 1986. Second, the Assistant United States Attorney who was present at the arraignment was not familiar with the case and failed to discover that the placing of the case on the November 1986 trial docket would cause a Speedy Trial violation. Since the Defendant has not shown that the Government voluntarily sought the delay, the delay can thus be characterized as one of administrative neglect or of negligence on the part of the United States Attorney's office.[1]

Although the Second Circuit has attributed negligence or administrative error on the part of the Government to weigh in favor of dismissal with prejudice,[2]

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[1] Under 18 U.S.C. § 3162(a)(2), the Defendant has the burden of proof on a motion to dismiss.

[2] *See, United States v. Caparella, 716 F.2d 976, 980 (2nd Cir. 1983).*

the Fifth Circuit has reasoned that a district court does not act improperly in finding that negligence is a factor weighing in favor of dismissal without prejudice. *United States v. Salgado-Hernandez,* 790 F.2d 1265, 1268 (5th Cir. 1986); *See also United States v. Bittle,* 699 F.2d 1201, 1208 (D.C. Cir. 1983). The court believes that harsh application of the Speedy Trial Act in a single negligence scenario will have no prophylactic effect. Consequently, the Court will weigh this factor in favor of dismissal without prejudice.

C) **Impact of Reprosecution on the Administration of the Act and Justice in General**

Defendant submits that there will be little negative impact on the administration of justice resulting from a dismissal with prejudice because the Government's objectives in the prosecution of the case have been substantially achieved. Defendant claims that the objective of the undercover program was to get a great deal of press in order to get compliance with the law and that this objective has been achieved. *See* Defendant's Response to Government's Response to Defendant's Motion to Dismiss Under the Speedy Trial Act, Exhibits "A", "B", and "C". While the objective of the program may have been met, the Court believes that this factor is balanced by the minimal prejudice encountered by the Defendant Melguizo. The delay is seeking trial has not been lengthy and the Defendant has been free on bond pending trial in this case since August 26, 1986. Accordingly, in light of the aforementioned factors, the indictment is hereby DISMISSED WITHOUT PREJUDICE.

DONE at Brownsville, Texas this 26th day of November, 1986.

/s/ Filemon B. Vela

FILEMON B. VELA
United States District Judge

APPENDIX B

DCB/

UNITED STATES DISTRICT COURT for
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

United States of America vs.
DEFENDANT— ENRIQUE MELGUIZO
DOCKET NO.— B-86-582-01

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—► **February 17, 1987**

COUNSEL ☐ Without Counsel — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

X With Counsel — DALE ROBERTSON
Name of counsel

PLEA ☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,
X NOT GUILTY on December 10, 1986.

There being a finding of

☐ **NOT GUILTY. Defendant is discharged**

X GUILTY, On February 17, 1987.

FINDING & JUDGMENT Defendant has been convicted of the offense(X) of **failure to file Currency Transaction Reports, in violation of Sections 5313 and 5322(a), Title 21, regulation at 31 C.F.R. Part 103, and Section 2, Title 18, United States Code in Counts 1 and 2 of the Indictment.**

OFFENSES OCCURRED: November 14, 1985, and December 3, 1985.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is **fined $2,500 in Count 1, and $2,500 in Count 2.**

SENTENCE OR PROBATION ORDER

It is further ordered the defendant make timely payment of the $5,000 fine to be paid within thirty (30) days, if he does not file an appeal. If an appeal is filed, the Court orders that the $5,000 fine be paid thirty (30) days after the Appellate Court's decision.

SPECIAL CONDITIONS Of PROBATION

The Court further imposes a $50.00 special monetary assessment on each of Counts 1 and 2 for a total of $100.00 pursuant to 18 USC 3013.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

APPROVED AS TO FORM /s/ signature illegible

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

COMMITMENT RECOMMENDATION

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAR 11 1987

SIGNED BY
XX U.S. District Judge
_ U.S. Magistrate ► /s/ Filemon B. Vela

HONORABLE Filemon B. Vela 3/11/87

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2198
Summary Calendar

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

ENRIQUE MELGUIZO
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(August 4, 1987)

Before GEE, RUBIN, and HILL, Circuit Judges.
PER CURIAM:

A Defendant convicted of failure to file currency transaction reports contends on appeal that the district court erred in refusing to dismiss with prejudice the complaint against him for the government's failure to try him within seventy days of his indictment as required by the Speedy Trial Act. Finding that the district court did not abuse its discretion in evaluating the statutory factors that informed its decision to dismiss without prejudice, we affirm the defendant's subsequent conviction.

I.

Enrique Melquizo was indicted on August 12, 1986 for failing to file, on two separate occassions, currency transaction reports in violation of 31 U.S.C. §§ 5313 and 5322(a). The indictment was made public on August 14. Because of technical errors in the charging language of the original indictment, the government filed a superseding indictment charging the same offenses on September 23, 1986, and the original indictment was dismissed. The court, acting through a magistrate, then scheduled the case for the November trial docket. On October 31, Melguizo moved to dismiss the superseding inndictment, claiming that the government had violated the Speedy Trial Act[1] by failing to try him within seventy days of the date the original indictment was made public. In response, the government conceded a violation of the Act, but argued that any dismissal should be without prejucdice. After analyzing the three factors that the Speedy Trial Act requires to be considered in determining whether dismissal should be with or without prejudice,[2] the district court dismissed the indictment without prejudice. Melguizo was thereafter reindicted for and convicted of the same offense, and was sentenced to pay a fine of $2,500 on each count.

II.

As this court stated in United States v. Salgado-Hernandez,[3] the decision whether to dismiss a complaint under the Speedy Trial Act with or without prejudice is "entrusted to the sound discretion of the district judge and

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[1] 18 U.S.C. § 3161(c)(1) (1982).

[2] 18 U.S.C. § 3162(a)(2) (1982).

[3] 790 F.2d 1265, 1267 (5th Cir.), *cert. denied*, ___U.S.___, 107 S.Ct. 463 (1986).

. . . no preference is accorded to either kind of dismissal." We therefore review the district court's decision to dismiss Melguizo's indictment without prejudice only to determine whether the district court has abused its discretion.[4]

The Speedy Trial Act states:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution of the administration of this chapter and on the administration of justice.[5]

We find that the district court did not abuse its discretion in applying these considerations. We discuss each one in turn.

In determining that the crime with which Melguizo was charged was serious, the district court looked primarily to the potential term of incarceration. Using the punishment prescribed by statute as a measure of the severity of the crime is a proper method of analysis under the Act.[6]

The two counts of failing to file currency transaction reports with which Melguizo was charged carried a combined possible sentence of ten years

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[4] *Id.; see also* United States v. Peeples, 811 F.2d 849, 850 (5th Cir. 1987).

[5] 18 U.S.C. § 3162(a)(2) (1982).

[6] *See* United States v. Bittle, 699 F.2d 1201, 1208 (D.C. Cir. 1983).

imprisonment.[7] This court upheld, in *Salgado—Hernandez*, a district court determination that the crime of illegally transporting aliens, for which the defendant faced a possible fifty-five year prison term, was serious.[8] We find that a possible sentence of ten years is also sufficient indication that the offense is serious.

Melguizo argues that in *Salgado—Hernandez* we erroneously relied on a Seventh Circuit decision, United States v. Hawthorne,[9] because that case allegedly involved an offense punishable by a longer period of imprisonment than five years stated by our opinion. We need not reexamine our characterization of *Hawthorne*, however, because, regardless of the prison term at issue in that case, a possible ten-year sentence is a sufficient indication of severity to support the district court's determination.

The Act next requires consideration of the facts and circumstances leading to the dismissal. The government stated to the district court that its failure to meet the seventy-day deadline was due to negligence. Specifically, the Assistant United States Attorney who was present when the United States Magistrate scheduled the trial was not familiar with the case and failed to discover that placing the case on the November trial docket would cause a speedy trial violation. Because Melguizo did not show that the government sought the delay or utilized it for any ulterior purpose, we find that the district court's characterization of the delay as "one of administrative neglect or of negligence on the part of the United States Attorney's office" was not erroneous.

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[7] 31 U.S.C. § 5322(a) (Supp. III 1985).

[8] *Salgado-Hernandez*, 790 F.2d at 1268; *see also Peeples*, 811 F.2d at 850-51.

[9] 705 F.2d 258 (7th Cir. 1983).

As we held in *Salgado-Hernandez*,[10] government oversight connot always excuse a failure to meet the speedy trial deadline, and the court should take into consideration such factors as whether the government regularly or frequently fails to meet the time limits, and whether the government has failed to meet the deadlines more than once with respect to the same defendant. Bound by the clear words of the Speedy Trial Act,[11] we must place on Melguizo the burden of proving the existence of these factors. Because he has failed to make any such showing, we find that the government's oversight in this case was not regular, frequent, or repetitive. The district court, therefore, did not err in determining that a dismissal with prejudice would have no prophylactic effect, or in concluding that the facts surrounding the delay weighed in favor of dismissal without prejudice.

Similarly, there is no error in the district court's evaluation of the impact of reprosecution on the administration of the Act and on the administration of justice. The delay of Melguizo's trial lasted only nine days, and, since he had been free on bond since August 26, 1986, he suffered minimal prejudice. This circuit and others have held that, when the delay is short and the defendant does not show more than minimal prejudice, reprosecution has little, if any, adverse impact on the administration of justice and the administration of the Act.[12] This factor, therefore, also weighs in favor of dismissal without prejudice.

For the above reasons, the judgment of the district court is AFFIRMED.

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[10] 790 F.2d at 1268.

[11] "The defendant shall have the burden of proof of supporting such motion [to dismiss]." 18 U.S.C. § 3162(a)(2) (1982). *See also Salgado-Hernandez*, 790 F.2d at 1268 & n. 14.

[12] *See Salgado-Hernandez*, 790 F.2d at 1268-69; *Hawthorne*, 705 F.2d at 261; *Bittle*, 699 F.2d at 1208.